Mar 31, 2000

(13)

Supreme Court, U.S.
FILED
MAR 31 2000
CLERK

No. 99-401

In the

Supreme Court of the United States

CALIFORNIA DEMOCRATIC PARTY, CALIFORNIA REPUBLICAN PARTY, LIBERTARIAN PARTY OF CALIFORNIA AND PEACE AND FREEDOM PARTY, ET AL.,
Petitioners,

v.

BILL JONES, SECRETARY OF STATE OF CALIFORNIA AND CALIFORNIANS FOR AN OPEN PRIMARY,
Respondents.

On Writ of Certiorari
To the United States Court of Appeals
For the Ninth Circuit

BRIEF OF THE STATES OF WASHINGTON AND ALASKA AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

BRUCE M. BOTELHO
Attorney General
of Alaska
P.O. Box 110300
Juneau, AK 99811

CHRISTINE O. GREGOIRE
Attorney General of Washington
* MAUREEN A. HART
Senior Assistant Attorney General
JEFFREY T. EVEN
Assistant Attorney General
1125 Washington Street SE
P.O. Box 40100
Olympia, WA 98504-0100
(360) 753-6200

Of Counsel:
DAN SCHWEITZER
National Association of
Attorneys General
750 First Street, N.E., Suite 1100
Washington, D.C. 20002

* *Counsel of Record*

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INTEREST OF THE AMICI CURIAE

Primary elections are an integral part of the process for selecting public officials who will make and administer the laws under which we must live. *Storer v. Brown*, 415 U.S. 724, 735 (1974). The states share an important interest in protecting the freedom of their citizens to select, within a widely permissible range, the primary election system that they believe best serves representative democracy. "The relative merits of closed and open primaries have been the subject of substantial debate since the beginning of this century, and no consensus has as yet emerged." *Tashjian v. Republican Party of Connecticut,* 479 U.S.208, 222 (1986). Amici believe this Court should allow the states to continue to engage in the debate.

The states of Washington and Alaska have had long and successful histories with blanket primary election systems. Indeed, the district court had before it substantial evidence concerning the actual experience with respect to blanket primary election systems in the state "laboratories" of democracy. After examining that experience, the district court quite properly concluded that the blanket primary election system serves compelling state interests and does not impermissibly intrude on the associational interests of political parties. (Pet. App. 42a-43a). The freedom of the citizens of Washington and Alaska to embrace the blanket primary election system – an election system that elevates candidates to public office who have the broadest unfettered support among their voters – clearly is threatened by the Political Parties' challenge to California's blanket primary.

But the threat posed by the Political Parties' challenge in this case does not end with the blanket primary election system. The challenge posed in this case directly implicates the latitude

of the states to opt for open primary election systems – indeed any system that extends the franchise in partisan primary elections beyond members of political parties. Nearly half of the states currently have such primary election systems.[1] The fundamental premise of the Political Parties in this case is that (absent a party's consent) only party members may be given the franchise in partisan primary elections, as only party members may choose what the Political Parties regard simply as the party's "standard bearer." (Pet. Brief 22, 27, 38-39). This constitutional defect that the Political Parties allege with respect to blanket primary election systems applies with equal force to open primary election systems. Thus, in a very real sense, this case does not present an isolated challenge to the blanket primary election system. It implicitly challenges the authority of the numerous states currently employing open primary systems to continue doing so, as well as the authority of states currently using other primary election systems to determine that an open primary election system would better serve the interests of their citizens.

STATEMENT OF THE CASE

A. The Washington and Alaska Blanket Primary Systems

In considering the Political Parties' challenge to California's blanket primary system, the district court had the advantage of receiving substantial evidence concerning the actual effect of a longstanding blanket primary system on political parties. Such evidence quite properly informed the judgment of the district

[1]Federal Election Commission, *Party Affiliation And Primary Voting 2000*, http://www.fec.gov/votregis/primaryvoting.htm.

court, and similarly serves to inform the judgment of this Court. Because that evidence was drawn from the experience of Washington with its blanket primary system, a brief explanation of Washington's primary election system, and its close counterpart in the state of Alaska, may prove helpful.

History And Voters. In 1935, Washington became the first state to adopt a blanket primary system. 1935 Wash. Laws 26. For the 65 years since then, Washington has conducted primary elections under this system, allowing its citizens to vote for any candidate in a primary election, without regard to candidate or voter party affiliation. The blanket primary has proven extremely popular with Washington citizens, for the freedom of choice it offers in selecting elected officials. *See* William F. Mullen & John C. Pierce, *Political Life in Washington* 66 (Thor Swanson, et al., eds., 1985) (citing statistical data reflecting a popular desire to select candidates free of party control). Although Washington does not require voters to disclose party affiliation in registering to vote or in voting, expert testimony in this case demonstrates that one-third of Washington voters "identify" as independents. (R.T. 542).

Alaska also adopted a blanket primary more than half a century ago, in 1947. With the exception of relatively brief periods when it experimented with different primary systems, Alaska has since used the blanket primary. As of 1994, approximately 54 percent of registered voters in Alaska were nonpartisan or undeclared. Approximately 23 percent were registered Republicans, 18 percent registered Democrats, and the remaining voters were split among other parties. *O'Callaghan v. State of Alaska*, 914 P.2d 1250, 1256 (1996).

Primary Election System for Major Political Parties. Washington's and Alaska's blanket primary systems operate with respect to "major political parties" similarly.[2] Any major party candidate seeking public office may file a declaration of candidacy during a statutory filing period, Wash. Rev. Code 29.15.010; Alaska Stat. 15.25.040. The names of all such candidates appear on the primary election ballot. Wash. Rev. Code 29.30.005; Alaska Stat. 15.25.060.

Under Washington law, all registered voters "may vote for their choice . . . for any candidate for each office, regardless of political affiliation and without a declaration of political faith

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[2] Washington and Alaska use different terminology to designate what might typically be thought of as "major political parties," and the two states define them somewhat differently. However, the concepts are similar. In Washington, a "major political party" is "a political party of which at least one nominee for [specified state-wide offices] received at least five percent of the total vote cast in the last preceding state general election in an even-numbered year." Wash. Rev. Code 29.01.090. There currently are two major political parties in Washington: the Democratic Party and the Republican Party. Any other political organization is defined as a "minor political party." Wash. Rev. Code 29.01.100.

By contrast, Alaska distinguishes between "political parties" and "political groups." A political party is an organization of voters who nominated a candidate for governor who received at least 3% of the vote at the preceding general election, or whose registered voters number at least 3% of the total votes cast for the office of governor in the preceding general election. Alaska Stat. 15.60.010(20). In Alaska, there are four political parties: the Republican Party, the Democratic Party, the Green Party of Alaska, and the Alaskan Independence Party. Any organized group of voters not satisfying the definition of a "political party" is referred to as a "political group." Alaska Stat. 15.60.010(19).

The term "major political party" is used in this brief to include both Washington's major parties and Alaska's political parties. Similarly, the term "minor party" is used to include Washington's minor parties and Alaska's political groups.

or adherence on the part of the voter." Wash. Rev. Code 29.18.200. Alaska's law operates in the same fashion, by providing that the primary is conducted using the same procedures as the general election. Alaska Stat. 15.25.090.

In Washington, a major party candidate in the primary advances to the general election if the candidate receives the plurality of all votes cast for candidates of the same party affiliation for the office in question, provided that the candidate also has received at least one percent of all of the votes cast for that office in the primary. Wash. Rev. Code 29.30.095. The same rule applies in Alaska, except that Alaska does not impose the additional 1% requirement. Alaska Stat. 15.25.100.

Primary Election System for Minor Political Parties. "Minor" party candidates reach the primary election ballot in Washington and Alaska somewhat differently from major party candidates, and somewhat differently in each state. In Washington, minor party candidates are selected by party conventions held immediately prior to the statutory filing period. Wash. Rev. Code 29.24.020. Thus, any minor party candidate who appears on a Washington primary election ballot is the choice of party members, and no others. A candidate certified as the nominee of a minor party may then file a declaration of candidacy and appear on the primary ballot in the same manner as major party candidates. Wash. Rev. Code 29.24. 070. A minor party candidate in Washington advances to the general election ballot by receiving at least 1% of all of the votes cast at the primary for all candidates for the same office. Wash. Rev. Code 29.30.095. This Court has upheld Washington's requirement that minor party candidates appearing on the primary election ballot demonstrate support among the entire electorate in order to advance to the general

election ballot. *Munro v. Socialist Workers Party*, 479 U.S.189 (1986).

To appear on the primary ballot, Alaska's counterpart of minor party candidates (candidates of political groups) must obtain the signatures of at least 1% of the number of voters who cast a ballot in the particular race for which the nomination is sought (or in closely aligned races for certain statewide candidacies) in the preceding general election. Alaska Stat. 15.25.160,.190. A "minor" party candidate advances to the Alaska general election ballot by receiving a majority of the votes cast for those candidates seeking the nomination of the political group. Alaska Stat. 15.25.205(a).

National Convention Delegates. Neither Washington nor Alaska employs its blanket primary to allocate delegates to the parties' national conventions. Although Washington conducts a blanket presidential preference primary, the law does not require use of the primary results in allocating delegates to the national conventions. Rather, Washington law leaves to the political parties the option of allocating convention delegates, in whole or in part, based on precinct caucuses and conventions. Wash. Rev. Code 29.19.055 (1). Alaska does not have a presidential preference primary, and its statutes are silent on the subject. Delegates to the national conventions are selected by party rule.

B. Open Primary Systems

Twenty states have open primary election systems.[3] In open primary systems, all voters are allowed to participate in primary elections, but are compelled to select a ballot listing candidates affiliated with a single political party. The selection is made at the time of voting. The details of open primary systems vary. For example, in some open primary states, the voter's ballot selection remains private. In other states, it does not. Although open primary systems differ from blanket primary systems in some respects, they share a characteristic fundamental to this case – under either system, nonparty members are allowed vote in primary elections.

SUMMARY OF ARGUMENT

"Public participation in the election of government officers is the essence of the American system of representative democracy. It is through elections, including primary elections, that public officials are chosen, that public policy is discussed and that government is legitimized." *State ex rel. LaFollette v. Democratic Party of United States*, 93 Wis.2d 473, 287 N.W. 2d 519, 539 (1980), reversed on other grounds, *Democratic Party of United States v. Wisconsin ex rel. LaFollette*, 450 U.S. 107 (1981).

In this case, the Political Parties assert that they have a constitutional right to restrict the franchise in state primary

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[3] *See* Federal Election Commission, *supra* note 1 (identifying Alabama, Arkansas, Georgia, Hawaii, Idaho, Illinois, Indiana, Michigan, Minnesota, Mississippi, Missouri, Montana, North Dakota, Ohio, South Carolina, Tennessee, Texas, Vermont, Virginia and Wisconsin as employing open primary election systems and describing their features).

elections. In essence, the Political Parties assert that the states are constitutionally compelled to disregard the freely made choices of their qualified voters in primary elections, and advance to their general election ballots only party member-preferred candidates. Neither the constitution nor the jurisprudence of this Court supports such a right.

Allowing all qualified voters a choice in selecting candidates entitled to advance to the general election ballot, unfettered by the check of political affiliation, directly advances the states' compelling interest in representative democracy. In adopting blanket primary systems, states such as Washington, Alaska and California have embraced an unremarkable yet compelling view – that representative democracy is best served by allowing all of their qualified voters, not just some of them, to be freely heard at an integral point in the public process for selecting government officials. That point is the primary election.

The single aspect of party associational activities restricted by the blanket primary – the narrowing of candidates for the general election – is a critical part of the machinery for selecting public officials who derive the legitimacy to govern only by virtue of the election process. At the same time, the blanket primary system leaves political parties with a wide array of associational and expressive opportunities to advance their common political goals. Not the least of these is the opportunity to fully and fairly compete among all of the state's voters. For each of these reasons, the blanket primary system cannot be said to severely burden the associational rights of political parties.

The blanket primary is a rational, nondiscriminatory election system. It directly advances compelling state interests in

representative democracy in an appropriately tailored fashion, and imposes only a limited restriction on political party associational interests. The constitution demands no more.

Despite the Political Parties' intimations to the contrary, the essential premise of their challenge to blanket primary election systems applies well beyond this case. The premise of the Political Parties' argument, and the basis for the constitutional defect that they allege infects blanket primary election systems, is that the states may not allow nonparty members to vote in primary elections, because only party members are entitled to choose the party's "standard bearer". This premise and alleged defect apply with equal force to open primary election systems employed by nearly half of the states. These systems, no less than blanket primary systems, authorize nonparty members to vote in partisan primary elections. No principled distinction of constitutional dimension exists between the two.

Fundamentally, the constitution leaves the states the discretion to select from among a wide variety of election systems, a system that is consistent with their citizens' interests in representative democracy and that appropriately respects other constitutional values. The blanket primary election system is one among many such permissible systems.

ARGUMENT

THE STATES MAY, CONSISTENT WITH THE FIRST AMENDMENT, EXTEND THE FRANCHISE IN PRIMARY ELECTIONS TO ALL OF THEIR QUALIFIED VOTERS

A. The Constitution Does Not Grant Political Parties An Unfettered Right To Require That Their Preferred Candidates Advance To The General Election Ballot

The single aspect of party associational activities affected by the blanket primary – the winnowing of candidates for the general election – is a critical step in the process of selecting public officials who only thereby derive the legitimacy to govern. *Storer*, 415 U.S. at 735; *Munro*, 479 U.S. at 196. By their very nature, primaries serve to narrow significantly the field of candidates for office. And as this Court has recognized, in many cases the only opportunity to cast a meaningful vote occurs in primary elections. *See Newberry v. United States*, 256 U.S. 232, 286 (1921) (Pitney, J., concurring) ("As a practical matter, the ultimate choice of the mass of voters is predetermined when the nominations have been made."); *United States v. Classic*, 313 U.S. 299, 319 (1941); *Morse v. Republican Party of Virginia*, 517 U.S. 186, 205-6 (1996). For these reasons, it would seem beyond refute that the process of electing officers to administer government is quintessentially a matter of public, not merely party, concern. *See Smith v. Allwright*, 321 U.S. 649, 664-65 (1944) ("when [the privilege of membership in a party] is also the essential qualification for voting in a primary to select nominees for a general election

. . . the action of the party [is] the action of the state" and is of legitimate concern to the state).

As a consequence of the essential public function that primary elections serve, the Court has upheld their substantial regulation. Thus, the right of a political party to *restrict* its organizational boundaries for the purposes of selecting candidates for public office – the right asserted by the Political Parties in this case – is not unfettered. As the Court recognized in *Allwright*, 321 U.S. at 660, concomitant with the public character of primary elections is a limitation on the power of political parties to restrict their membership. In *Allwright*, the Equal Protection Clause imposed the limitation, and barred political parties from excluding racial minorities. Decisions subsequent to *Allwright* have upheld many state laws – designed to promote a variety of state interests – that imposed limitations on the primary election process.[4]

A recent example of such a decision is *Timmons v. Twin Cities Area New Party*, 520 U.S. 351 (1997). There, the Court sustained a law that precluded political parties from placing their preferred nominee on the ballot when the candidate also had received the nomination of another political party. The Court explained, "The New Party's claim that it has a right to select its own candidate is uncontroversial, so far as it goes . . . . It does not follow, though, that a party is absolutely entitled to have its nominee appear on the ballot as that party's candidate."

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[4] *See also Roberts v. United State Jaycees*, 468 U.S. 609 (1984) (private organization playing a far less fundamental public role than political parties precluded from limiting membership based on gender); *Morse*, 517 U.S. at 186 (decision by political party to impose a filing fee for delegates to state nominating convention held subject to Voting Rights Act).

Id. at 359. Weighing the character and magnitude of the burden that the state's rule placed on the New Party's claimed right against the interests the state offered to justify the burden and the extent to which the state's concerns made the burden necessary, the Court sustained Minnesota's law.

The jurisprudence of this Court simply does not stand for the proposition that a political party has free reign to control who can vote in primary or general elections and who will appear on the general election ballot. The Constitution gives the states substantial authority and responsibility for regulating elections. *See Tashjian,* 479 U.S. at 217 (The Constitution grants States "broad power to prescribe the 'Time, Places and Manner of holding elections for Senators and Representatives," Art. I, § 4, cl. 1, which power is matched by state control over the election process for state offices."). Exercising this authority, the states have enacted diverse and comprehensive election codes. To some extent, these codes invariably implicate constitutional interests in voting and in political association. *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983).

With limited exceptions, state election regulations challenged on the basis of the right to vote or to associate for political purposes have been held to be within a broad span of constitutionally permissible regulation. *See Burdick v. Takushi*, 504 U.S. 428, 438 (1992). The test adopted by this Court to evaluate state election regulations is a flexible one: although election regulations that impose severe burdens on political party associational rights must be narrowly tailored and advance a compelling state interest, lesser burdens require less exacting review, and a state's important regulatory interests will usually suffice to justify reasonable, nondiscriminatory restrictions. *Timmons*, 520 U.S. at 358. The blanket primary

system reflects a permissible balance of state and political party interests in the system for electing public officials, and fully satisfies those constitutional demands.

B. Blanket Primary Systems Promote Representative Democracy, An Unquestionably Compelling State Interest

"[T]he true principle of a republic is, that the people should choose whom they please to govern them. Representation is imperfect in proportion as the current of popular favor is checked. This great source of free government, popular election, should be perfectly pure and the most unbounded liberty allowed." *Powell v. McCormack*, 395 U.S. 486, 540-41 (1969), (quoting 2 Debates on the Federal Constitution 257 (J.Elliot ed. 1876)).

The citizens of the states of California, Washington and Alaska have adopted the wholly unremarkable yet compelling view that broad-based electoral support is at the heart of political stability and governmental legitimacy. When a state's citizens choose to adopt a blanket primary either directly (as did California's) or indirectly through elected representatives (as did Washington's and Alaska's), they embrace an overarching vision of representative democracy. Blanket primary systems reflect a belief that electoral integrity, and political stability, are best advanced by an election system that elevates to public office candidates who receive the broadest support among all citizens qualified to vote, unrestricted in their choices by considerations of political party affiliation. It is difficult to identify a more forceful objective in a representative democracy than ensuring that elected officials have the freely exercised

support of the broadest possible segment of the electorate. Blanket primary systems accomplish this objective by affording all qualified voters the opportunity to vote in primary elections without artificially restricting voter choice based on the party affiliation of voters or candidates.

At the same time, blanket primary systems serve several subsidiary yet equally important state interests. In sustaining Alaska's blanket primary system against a First Amendment challenge by the state Republican Party, the Supreme Court of Alaska recognized encouraging voter turnout as among the important state interests advanced by the blanket primary. *O'Callaghan*, 914 P.2d at 1262-63. The Supreme Court of Washington identified several additional compelling interests served by Washington's blanket primary system. Among them were: "[a]llowing each voter to keep party identification, if any, secret; allowing the broadest possible participation in the primary election; and giving each voter a free choice among all candidates in the primary." *Heavey v. Chapman*, 93 Wn.2d 700, 611 P.2d 1256, 1259 (1980). *See also Wisconsin ex rel. LaFollette*, 450 U.S. at 120-21 ("Concluding that the open primary serves compelling state interest [sic] by encouraging voter participation, the [Wisconsin Supreme Court] held the state open primary constitutionally valid. Upon this issue, the Wisconsin Supreme Court may well be correct.").

The Political Parties' effort to minimize these compelling state interests and recast them as ensuring the election of "moderate" candidates fails. (Pet. Brief 38, 42). The blanket primary system, pure and simple, ensures that those persons elevated to public office enjoy the broadest possible support of the general electorate by whose authority they govern, unfettered by artificial constraints – whether the electorate

proves "moderate" or "immoderate" in its choices. The Political Parties' call for proof of the states' interests is also unavailing. (Pet. Brief 38). The states are well-entitled to rely on these proffered interests and their reasonable assessments of the election system that best serves representative democracy, without the trial-type evidence demanded by the Political Parties. Elaborate empirical verification of the weightiness of the State's asserted justifications is not required. *Timmons*, 520 U.S. at 364; *Munro*, 479 U.S. at 195-96 ("Legislatures . . . should be permitted to respond to potential deficiencies in the electoral process with foresight rather than reactively).

Amici take no issue with the view that strong political parties also may have a role to play in enhancing representative democracy and in contributing to political stability. Amici support the constitutional prerogative of their sister states to make such a policy judgment and to structure their election systems based on such a view. Indeed, a number of states that have adopted closed primary election systems presumably have done so believing that representative democracy is advanced in their states by enhancing the power of political parties. Amici simply submit that the constitution does not compel the states to adopt this view of what best serves representative democracy, or foreclose the states from taking a different view. The approach taken by blanket primary states is no less legitimate or compelling because it endeavors to respect a role for affiliated *and* unaffiliated voters in the primary election system. "If political parties and politically affiliated voters are to have more power in the election process, that is power taken from unaffiliated voters." *O'Callaghan*, 914 P.2d at 1262. Indeed, as the Alaska Supreme Court observed, concern with disproportionately diminishing the role of unaffiliated voters in the election process is particularly appropriate in states such as

Alaska (and Washington) that have high percentages of the electorate who are not affiliated with a political party. *Id.*

C. The Burden That Blanket Primary Laws Place On The Associational Rights Of Political Parties Is Well Within Constitutional Bounds

1. As The Courts Below Recognized, The Associational Rights Of Political Parties Have Not Been Severely Burdened By Washington's Blanket Primary

In ruling on the Political Parties' challenge to California's blanket primary, the district court was presented with substantial evidence concerning Washington's experience with its blanket primary system. The testimony heard and credited by the district court demonstrates that political parties have not simply survived under Washington's longstanding blanket primary system – they have thrived[5].

Based in significant part on evidence regarding Washington, the court below found little reason to suggest that California's blanket primary would diminish the efficacy or strength of the political parties in California by any substantial degree. (Pet. App. 35a). In this respect, the court cited a study of the political parties in the 1970's and 1980's in 13 western states, including California and Washington, "conclud[ing] that the political parties in Washington were the most competitive with one another of all 13 states." (Pet. App. 35a-36a). The court

[5] The amicus brief of the Republican Party of Alaska, et. al, asserts a plethora of "factual" allegations concerning that state's experience with Alaska's similar primary system, but is devoid of support for them.

further found that "[b]oth the Democratic and Republican parties continue to be strong political parties in Washington, and can be expected to operate with little diminution in their effectiveness in California." (Pet. App. 36a). On this score, the district court credited and summarized testimony of Dr. David J. Olson, a professor of political science at the University of Washington, and noted expert on Washington politics.

> According to Professor Olson the Washington Republican Party has been ranked as among the strongest Republican parties in the nation. Professor Olson states that the Washington Republican Party "is alive, it is healthy, it is well, it is vigorous. It is the single most important institution for recruiting candidates to run for office. It's the single most important institution for endorsing candidates. It is the most important fund-raising institution in the conduct of elections." R.T. at 527. According to Professor Olson although the Washington Democratic Party is not so dynamic as its competitor, it is still of above average organizational strength as compared to the Democratic parties of the 50 states. R.T. at 528.

(Pet. App. 36a-37a).

In addition, although the Parties argued extensively below that they would suffer from "raiding" under Proposition 198, the district court found that the political parties had failed to demonstrate any instance in which raiding determined the outcome of a primary election. (Pet App. 30a). Again, the court cited the testimony of Professor Olson:

> The potential for raiding under the blanket primary generates wide media attention and spawns electioneering lore that is simply unwarranted by actual experience.

Technically defined, raiding would occur where partisan voters of party X cross-over in sufficient numbers to help select the weakest or most vulnerable candidate in party Y. The requirements for this form of electoral subterfuge are: (1) the absence of a meaningful primary contest in party X; (2) provision of sufficient information to identify the weaker and most vulnerable potential opponent in party Y; (3) concerted action by a large enough bloc of voters in party X to influence the outcome in the primary of party Y; and (4) the abandonment of traditional party loyalties by partisan voters to enter the opponent's primary. . . . In the experience of Washington state, these requirements are simply too demanding and have not been fulfilled in actual practice. (Pet. App. 30a)

2. Case Law And History Confirm That Blanket Primary Systems Do Not Impose A Severe Burden On Associational Rights Of Political Parties

Despite the findings below and Washington's experience, the Political Parties assert that the blanket primary severely burdens their associational rights. The Political Parties seem to assert this proposition as a matter of law, on the theory that the states must disregard the uninhibited choices of the broad electorate in selecting candidates entitled to advance to the general election ballot, in favor of party-preferred candidates. This position overstates the First Amendment interests of political parties to select party nominees, and is not in keeping with this Court's jurisprudence, the nation's history or the states' experience.

Disregarding the fundamental admonishment of the Court that separating permissible election-related regulations from unconstitutional infringements on First Amendment freedoms is determined by "hard judgments" in light of the competing values involved, not "bright lines," *Storer*, 415 U.S. at 730, *Timmons*, 520 U.S. at 359, the Political Parties contend that the constitution imposes a single hard and fast rule that controls this case. They place particular reliance on *Tashjian*, which they claim grants parties an absolute right to restrict the franchise in state primary elections to party members. The Political Parties give *Tashjian* a reach that it cannot support.

Tashjian considered whether the state of Connecticut could preclude nonparty members from voting in state primary races, where the Party had invited their participation. Thus, in *Tashjian*, the Court was called upon to consider the nature of the Party's right to *broaden* its associational boundaries in the selection of nominees for public office, and to balance the severity of the state's interference with that right against the state's interests in *restricting* voter participation in an integral part of selecting government officers. In this case, by contrast, the Court must consider the nature of the Political Parties' right to *restrict* their associational boundaries in selecting candidates for public office, and must balance the nature of the state's intrusion on that right against the state's interest in *broadening* voter participation and choice in an integral part of the process for selecting government officers. In each of these respects, the instant case presents an equation starkly different from *Tashjian*. As the court below correctly recognized, *Tashjian* "had no occasion to address either the State's interests in an open or blanket primary or the burdens imposed on a political party by such a primary system." (Pet. App. 19a).

One reasonably may weigh the character and magnitude of the burden placed by blanket primary election systems on the associational interests of political parties only by considering the full scope of those interests. Although the Political Parties focus on a single aspect of their associational interests – candidate nomination – candidate nomination does not represent the universe of political party association.

In considering the significance of the burden that Minnesota's anti-fusion law placed on the New Party in *Timmons*, the Court pointed out that the party remained "free to endorse whom it likes, to ally itself with others, to nominate candidates for office, and to spread its message to all who will listen." *Id.* at 361. Similar opportunities for political association and expression remain under blanket primary laws. Blanket primary systems do not prohibit the alliance of party members or silence the voice of the party faithful. Political parties and their members remain free to recruit candidates, to determine and disseminate party ideology, to solicit contributions, to identify and endorse preferred candidates, to financially support preferred candidates, to vote for preferred candidates, to convince the broader electorate to support those choices, and to disavow candidates that the party does not wish to support.[6]

To the extent that blanket primary systems restrict political party associational interests, they do so only at the point where party associational activities intersect with the public process of legitimizing government. At this point, the exercise at hand

[6] In this last respect, the Court has given little credence to the argument that "voters can be "misled" by party labels. *See Tashjian*, 479 U.S. at 220 ("our cases reflect a greater faith in the ability of individual voters to inform themselves about campaign issues") (quoting *Celebrezze*, 460 U.S. at 797).

is not predominantly political association or expression, but the voters' selection of candidates entitled to advance to the general election and remain in contention for public office. "Ballots serve primarily to elect candidates, not as fora for political expression." *Timmons*, 520 U.S. at 363.

In considering the character and magnitude of the claimed burden placed on the political parties by the blanket primary, it also is appropriate to note that the election systems of the blanket primary states provide automatic ballot access to all potential major party candidates. Thus, the blanket primary affords every conceivable major party nominee the opportunity to compete in a statewide election, and affords every major party the opportunity to campaign among the entire pool of registered voters. *See Munro*, 497 U.S. at 197-98. The same is true of every minor party candidate satisfying primary ballot access criteria and the party of every such candidate. In sum, the blanket primary leaves unregulated a wide array of associational and expressive activities and political opportunity on the part of political parties.

The major parties here, like the New Party in *Timmons*, claim that the state must advance the candidate of the party's choice to the general election ballot. The Political Parties assert this claim even though the candidate cannot garner a plurality of the votes of the qualified electorate for candidates of the same political affiliation, let alone for the entire slate of candidates. ("States are not burdened with a constitutional imperative to reduce voter apathy or to "handicap" an unpopular candidate to increase the likelihood that the candidate will gain access to the general election ballot.") *Munro*, 479 U.S. at 198. Viewed in light of actual experience and the totality of the associational activities and interests of

political parties, the burden imposed by blanket primaries on the rights of political parties cannot fairly be considered severe. The courts below correctly so concluded.

3. The Blanket Primary Is Appropriately Tailored To Promoting The Important Interests Of The States

The blanket primary satisfies the flexible balancing test applicable to election regulations. It is a reasonable, nondiscriminatory election system that restricts a single aspect of political party associational activities, and does so only where those activities directly intersect with the public process for legitimizing government. At the same time, the blanket primary serves important regulatory interests of the states, by affording to citizens the most meaningful opportunity to participate in the selection of elected public officials. The constitution requires no more.

Nevertheless, even if the blanket primary system were viewed as imposing a severe burden on the associational interests of political parties, the system would withstand constitutional scrutiny. As the courts below held, and as the Washington Supreme Court has recognized, the blanket primary is precisely tailored to the states' compelling interest in allowing voters the broadest choice in selecting the public officials who thereby receive the authority to govern. "[T]he fundamental goal of enhancing representativeness by providing all voters with a choice that is not predetermined by party members alone can only be advanced by the blanket primary." (Pet. App. 43a). As the Washington Supreme Court found, "[T]he blanket primary . . . allows complete voter freedom . . . an open primary, on the other hand, restricts a voter to

candidates of only one party. The blanket primary is the least drastic means available to promote this legitimate interest." *Heavey*, 611 P.2d at 1259

D. The Political Parties' Fundamental Objection To The Blanket Primary Applies Equally To Open Primaries

At its heart, the theory of the Political Parties in this case is that they have a constitutional right to restrict the franchise in primary elections to party members. The fundamental objection of the Political Parties to the blanket primary is that it allows voters who are not party members to vote in primary elections, and thereby select what the party calls its "standard bearer." (Pet. Brief 22, 38-39). Although the Political Parties half-heartedly suggest that open primaries may not suffer from the same constitutional defect, it is difficult to see how this can be so. The open primary, like the blanket primary, permits voters who are not party members to vote in a partisan primary election. Thus, the open primary, like the blanket primary, allows voters who are not party members to participate in selecting party-affiliated candidates to advance to the general election – a matter that the Political Parties consider to be nothing more than selecting their "standard bearer," and strictly party business. Similarly, the open primary no less than the blanket primary, extends the franchise to persons who need not and do not share political ideology. The open primary no less than the blanket primary precludes political parties from "identifying the people who constitute the association," *Wisconsin ex rel. LaFollette*, 450 U.S. at 122, when that identification serves as the essential qualification for determining which candidates are entitled to remain in

contention for public office by advancing to the general election ballot.

The Political Parties intimate, however, that open primaries may be viewed as limiting participation to voters who are "affiliated" with a party, even though those voters have chosen not to become members of the party. (Pet. Brief at 29-30). The "affiliation" to which the Political Parties refer presumably is the requirement of open primary laws that every voter, including unaffiliated voters, select the ballot of only one political party or forfeit the opportunity to vote. The notion that such a statutorily-driven ethereal contact with a political party is of constitutional dimension, determining the latitude of the states to structure their election systems is remarkable. "If the concept of freedom of association is extended to such casual contacts, it ceases to be of any analytic use." *Tashjian*, 479 U.S. at 235 (Scalia, J., dissenting). *See also Wisconsin ex rel. LaFollette*, 450 U.S. at 111 n.4 (defining open primaries in terms of the absence of any declaration of party affiliation or party preference).

There is no constitutionally significant difference between open and blanket primary election systems in these fundamental respects, and no principled basis for concluding that the open primary is consistent with the associational rights of political parties if the blanket primary is not. The blanket primary states are not unique in affording the franchise in primary elections to nonparty members. Nearly half of the states do so. If the legal rule urged by the Political Parties emerges as the rule in this case, it not only will decide the validity of blanket primary election systems. It effectively will seal the fate of open primaries as well.

CONCLUSION

For the foregoing reasons, the decision below should be affirmed.

Respectfully submitted,

CHRISTINE O. GREGOIRE
Attorney General of Washington
* MAUREEN A. HART
Senior Assistant Attorney General
Jeffrey T. Even
Assistant Attorney General
1125 Washington Street SE
P.O. Box 40100
Olympia, WA 98504-0100
(360) 753-6200

Of Counsel:
Dan Schweitzer
National Association of
Attorneys General
750 First Street, N.E.
Suite 1100
Washington, D.C. 20002

* *Counsel of Record*

March 31, 2000